IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-733

HIGHWAY & CITY TRANSPORTATION, INC.,

Petitioner,

vs.

VITO BALESTRI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois which affirmed a judgment of the intermediate Appellate Court of Illinois that had reversed a judgment and remanded the cause for a new trial only as to damages solely for the trial Judge's failure to give an erroneous jury instruction in the place and stead of an

approved and statutorily mandated Illinois Pattern Jury Instruction which was given, thereby not only depriving the Petitioner of a jury trial, but as the dissenting Justices observed, sent jury trials in Illinois backwards into the nefarious practices and tactics of 25 to 50 years ago.

OPINIONS BELOW

The Opinion of the Supreme Court of Illinois, as yet unreported in the official Illinois reporter appears in Appendix A. This Opinion, with dissenting opinions by Justices Underwood and Ryan, affirmed the Appellate Court of Illinois, First District, whose Opinion is reported in *Balestri v. Highway & City Transportation, Inc.*, 57 Ill. App. 3d 669, 373 N.E.2d 689 (1978), and is set forth in Appendix B. This Opinion of the Appellate Court reversed a judgment and remanded the cause for a new trial only as to damages solely for the trial Judge's failure to give an erroneous and improper jury instruction.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on June 1, 1979. A Petition for Rehearing was filed within the time allowed by the Rules of Court and was denied on September 28, 1979 (Appendix C). This Petition for Writ of Certiorari is filed less than 90 days from said date. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257(3) and 2101(c).

QUESTION PRESENTED

Whether a decision of the Supreme Court of Illinois holding that a judgment should be reversed and the cause remanded for failure to give an admittedly erroneous jury instruction is an invasion and deprivation of the defendant's rights to trial by jury, due process and equal protection of the laws, especially were an approved instruction was given to the jury as required by the Illinois rule adopted by the Supreme Court of Illinois.

SUMMARY OF POINTS AND AUTHORITIES

ILL. REV. STATS. 1977, Ch. 110A, par. 239(a).
ILL. REV. STATS. 1977, Ch. 110A, par. 2(a).
U.S. Constitution, VII Amendment.
U.S. Constitution, XIV Amendment.
Brinkerhof v. Hill, 281 U.S. 673 (1930).
Great Northern Rwy. v. Sunburst, 287 U.S. 358 (1932).
Section 12, Article I, Illinois Constitution (1970).
Sections 1 and 2, Article I, Illinois Constitution (1970).
Section 13, Article I, Illinois Constitution (1970).
Olson v. Chicago Transit Authority, 1 Ill. 2d 83, 115 N.E.2d 301 (1953).
Wooley v. Hafner's Wagon Wheel, Inc., 22 Ill. 2d 413, 196 N.E.2d 757 (1961).

RULE INVOLVED

For the convenience of the Court, Illinois Supreme Court Rule 239(a), ILL. REV. STATS. 1977, Ch. 110A, par. 239(a), provides:

> "Use of IPI Instructions: Requirements of Other Instructions. Whenever Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law. Whenever IPI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument."

This Rule has the force and effect of a statute. ILL. REV. STATS. 1977, Ch. 110A, par. 2(a).

STATEMENT OF FACTS

The facts are set forth in the Opinions of the reviewing Courts in Appendices A and B, and need not be repeated here.

The petition for rehearing filed in the Supreme Court of Illinois raised constitutional and other objections which could not have been raised earlier because the Opinion of the Supreme Court, in effect, rendered Rule 239 (ILL. REV. STATS. 1977, Ch. 110A, par. 239(a)) unconstitutional and sent Illinois jury trials backwards some 25 years to a point in time when nefarious practices, such as giving erroneous and slanted jury instructions on each particular phase of an issue rendered civil jury trials in Illinois a mockery.

REASONS FOR GRANTING CERTIORARI

THE OPINION AND JUDGMENT OF THE SUPREME COURT OF ILLINOIS VIOLATE FUNDAMENTAL CONCEPTS OF TRIAL BY JURY, DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BY REQUIRING THE REVERSAL OF A CIVIL JURY TRIAL FOR FAILURE TO GIVE AN ADMITTEDLY ERRONEOUS JURY INSTRUCTION.

The jury trial which was had below is protected by the Seventh and Fourteenth Amendments to the United States Constitution and Article 1, Section 13 of the Illinois Constitution. The constitutional concern is that the right to a jury trial be "preserved" and the State Charter indicates "as heretofore enjoyed." *Olson v. Chicago Transit Authority*, 1 Ill. 2d 83, 115 N.E.2d 301 (1953). In Illinois the jury trial system is largely the Illinois Pattern Jury Instruction system (hereinafter "I.P.I."), under Rule 239, ILL. REV. STATS., Ch. 110A, par. 239.

The Opinion, and hence judgment, of the Supreme Court of Illinois construed Rule 239 so as to require an *admittedly* erroneous and argumentative instruction, and deprived this Defendant of its jury trial even though an approved I.P.I. instruction on the same subject was given and the verdict was not held to be inadequate. This not only does not "preserve" jury trials but takes away the jury trial "as heretofore enjoyed." Rule 239 is therefore unconstitutional.

The mandate of the Illinois Supreme Court cannot even direct the trial Judge to a specific instruction which he can now give to the next jury on retrial. Neither this not any reversal for failure to give an erroneous jury instruction has ever been part of the jury trial system in Illinois nor anywhere else in American jurisprudence. Engrafting this onto Rule 239 not only

renders it unconstitutional as a deprivation of the fundamental right to trial by jury but also as a deprivation of due process and equal protection. The federal guaranty of due process extends to state action through its judicial branch. *Brinkerhof v. Hill*, 281 U.S. 673, 677 (1930) (*certiorari* to the Supreme Court of Missouri). Due process, if it envisages anything, must envisage a jury trial not its nullification for failure to give error. The constitutionally protected right to trial by jury has been decimated, for no legally sufficient reason, if a jury trial can be reversed for failure to give an erroneous non-I.P.I. instruction. As stated by the United States Supreme Court in *Brinkerhof:*

> ". . . While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." 281 U.S. at 682.

As the dissenting Justices appropriately observed, the Opinion of the Supreme Court of Illinois has deprived this Defendant of its jury trial because the trial Court should have given to the jury an instruction which is *admittedly* argumentative and erroneous. Prior to the instant Opinion, the Supreme Court of Illinois has held that a new trial is required where an I.P.I. instruction is available but not given. *Wooley v. Hafner's Wagon Wheel, Inc.*, 22 Ill. 2d 413, 196 N.E.2d 757 (1961).

The Illinois Pattern Jury Instruction system of instructing juries in jury trials was adopted to eradicate nefarious practices, such as giving erroneous and slanted jury instructions on each particular phase of an issue which rendered jury trials a mockery. The interpretation of Rule 239 as engrafted upon it by the

Supreme Court of Illinois unconstitutionally endorses such deprivation of the right to trial by jury requiring a retrogressive return to the pre-I.P.I. system of jury trials.

The Supreme Court of Illinois rendered Rule 239 unconstitutional because it, in effect, emasculated Rule 239 and sent Illinois jury trials backwards some 25 years to a point in time when decadent and improper practices were in vogue.

It is not enough to merely declare that the Constitution protects the right to trial by jury, if, having said that, no further judicial attention is given to whether jury trials are in fact being preserved. The criteria used by the Supreme Court of Illinois to erase the jury trial herein are so vague, indefinite and conjectural that jury trials can now be wiped out for failure to give erroneous instructions on any of the other phases of any of the elements of a cause of action, or, in other cases, the elements of a defendant's defense or defenses. The result is no longer a jury trial as protected by the Constitution.

The I.P.I. system was established to protect the constitutional right to trial by jury, and that right, if it means anything must mean not as it might be changed or nullified from day to day, but "as heretofore enjoyed" at the time of the adoption of Section 13 of Article 1 of the Illinois Constitution. It is submitted that that constitutional right has now been destroyed and rendered a nullity.

Section 12 of Article I of the Illinois Constitution requires the preservation of rights recognized by the common law and does not permit or authorize the courts to render the right to trial by jury a nullity. ILL. CONST. 1970, Art. I, § 12. Under the separation of powers doctrine, the fashioning of hitherto unknown remedies is expressly a legislative function upon which the Supreme

Court of Illinois has infringed. *Great Northern Rwy. v. Sunburst*, 287 U.S. 358 (1932) (*certiorari* to Supreme Court of Montana).

It is further respectfully submitted that the Opinion of the Supreme Court of Illinois has invaded substantial constitutional rights of this Defendant by depriving it of its right to a jury trial which existed at the time the Complaint was filed and at the time the judgment was rendered and substitutes in its place a jury trial which is a mockery and a nullity unknown prior to the Opinion of the Supreme Court of Illinois, contrary to the due process and equal protection clauses of the State and Federal constitution and this, too, is a constitutional deprivation that occurred for the first time in the Supreme Court of Illinois when the instant Opinion was rendered. U.S. CONST. XIV Amendment; ILL. CONST. 1970, Art. I, §§ 1, 2.

The constitutional questions arose for the first time in the Supreme Court of Illinois upon rendition of its Opinion and were raised on Petition for Rehearing, which was denied.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Illinois

Docket No. 50581—Agenda 19—November 1978.

VITO BALESTRI, Appellee, v. TERMINAL FREIGHT COOPERATIVE ASSOCIATION *et al.*—(Highway & City Transportation, Inc., Appellant.)

MR. CHIEF JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiff, Vito Balestri, appealed from the judgment of the circuit court of Cook County entered in his favor on a jury verdict in the amount of $50,000, and against Highway & City Transportation, Inc. (hereafter defendant). The appellate court reversed and remanded for a new trial on the issue of damages only (57 Ill. App. 3d 669), and we allowed defendant's petition for leave to appeal. The facts are stated in detail in the opinion of the appellate court and will be reviewed here only to the extent necessary to discuss the issues.

Plaintiff, while employed as a city pickup and delivery driver, was directed to the premises of Terminal Freight Handling Company for the purpose of picking up cartoned refrigerators. Bernard Boos, defendant's employee, was assigned to assist plaintiff in loading the refrigerators onto plaintiff's truck. Plaintiff was injured when a two-by-four fell from one of the cartons and struck him on the elbow. During the occurrence the weight of the refrigerator shifted, resulting in plaintiff's body being severely twisted.

In reversing the judgment and remanding for a new trial on the issue of damages only, the appellate court held that the circuit court had erred in refusing to give the following instruction:

> "If you find that the defendant was negligent and that its negligence was a proximate cause of injury to and disability of the plaintiff, you should then find for the plaintiff and his right to recover damages for such injuries and disability is not barred or to be limited in any way by the fact, if you find it to be a fact, that the plaintiff's injury and disability resulted from an aggravation of a pre-existing condition by the occurrence in question nor by reason of the fact, if you find it to be a fact, that the plaintiff because of a pre-existing physical condition was more susceptible to injury than other persons might have been."

This instruction, which is not contained in Illinois Pattern Jury Instructions, Civil (2d ed. 1971) (IPI Civil), is based upon the opinion in *Pozzie v. Mike Smith, Inc.* (1975), 33 Ill. App. 3d 343. In *Pozzie*, in holding that the refusal of instructions tendered by the plaintiff was error, the appellate court said:

> "Plaintiff tendered four jury instructions regarding the aggravation of a preexisting condition. The only instruction given to the jury was IPI—Civil 2d 30.03, a general instruction advising the jury to compensate plaintiff for among other things 'the aggravation of any pre-existing condition.' The other three instructions which were refused sought to further clarify the law. Plaintiff's Instruction 14 informed the jury that plaintiff's right to recover damages for his injuries and disabilities is not limited by the fact that plaintiff's injuries and disabilities resulted from the aggravation of a preexisting condition. Instruction 15 advised the jury that damages should not be reduced because the injuries and resulting disability were due in part to a preexisting condition of plaintiff. Instruction 16 stated that it is not a defense to this action that plaintiff, because of a preexisting physical condition, was more susceptible to injury than other persons might have been. These three instructions are not in IPI. However, IPI instructions are not intended to be all inclusive. We believe that Plaintiff's Instructions 14, 15 and 16 are each a correct statement of the law, and that the failure of the trial court to give at least one of them, with or without modification, left the jury without proper judicial guidance. In this case the singular submission of IPI—Civil 2d 30.03 inadequately advised the jury of its duty under the law." 33 Ill. App. 3d 343, 347.

Supreme Court Rule 239 (58 Ill. 2d R. 239) provides that when "Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law." There are situations where the IPI instruction is inadequate and an additional instruction is appropriate. (*Department of Public Works & Buildings v. Association of Franciscan Fathers* (1977), 69 Ill. 2d 308.) The instruction given by the court contained the language of IPI Civil No. 30.01, and enumerated, *inter alia,*

> "1. The nature, extent and duration of the injuries." (IPI Civil No. 30.02.)
>
> "2. The aggravation of any pre-existing ailment or condition." (IPI Civil No. 30.03.)
>
> "3. The disability resulting from the injuries." (IPI Civil No. 30.04.)

It was the defendants' theory that because of a preexisting back condition plaintiff had suffered several periods of disability prior to the date of the injury in question.

Plaintiff's testimony showed that he had suffered injuries on three prior occasions, that approximately two

years before the injury a work-related injury resulted in his being off work for approximately four months; that approximately a year later another work-related injury to his left elbow and back resulted in his being absent from work for approximately six months; and that several months prior to the occurrence in question he had suffered injuries in an automobile accident which resulted in his being off work for two months. The medical testimony would support the conclusion that there may have been aggravation to the L–5 S–1 area of plaintiff's back, and the testimony shows a preexisting condition known as spondylolisthesis.

It is well settled that a tortfeasor is liable for the injuries he causes, even though the injuries consist of the aggravation of a preexisting condition. (*Chicago City Ry. Co. v. Saxby* (1904), 213 Ill. 274.) We are of the opinion that the instruction given did not adequately instruct the jury on this issue. The third element of damages (IPI Civil No. 30.04) makes no reference to the injuries resulting from the aggravation of a preexisting ailment or condition and can be construed to limit damages to the disability resulting from those injuries included in element (1) (IPI Civil No. 30.02). Furthermore, it failed to instruct the jury that the damages assessed should not be reduced because the disability was due in part to a preexisting condition or for the reason that plaintiff, because of a preexisting condition, was more susceptible to injury than an individual would have been without the preexisting condition. Although it may be contended that the instruction as tendered is argumentative, the basis for its refusal was that it was not in IPI and plaintiff had no opportunity to offer any modification. We agree with the appellate court that in summarily refusing to give the instruction the circuit court erred.

A new trial on the question of damages only is appropriately granted "where (1) the jury's verdict on the question of liability is amply supported by the evidence; (2) the questions of damages and liability are so separate and distinct that a trial limited to the question of damages is not unfair to the defendant; and (3) the record suggests neither that the jury reached a compromise verdict, nor that, in some other identifiable manner, the error which resulted in the jury's awarding inadequate damages also affected its verdict on the question of liability." (*Robbins v. Professional Construction Co.* (1978), 72 Ill. 2d 215, 224.) The record shows the requisite elements, and the judgment of the appellate court is affirmed.

Judgment affirmed.

MR. JUSTICE UNDERWOOD, dissenting:

In 1954 the Illinois Judicial Conference conducted a study which disclosed that during the preceding 25-year period 38% of the reversals by the reviewing courts of Illinois resulted in whole or in part from errors in instructions. (*Foreword* to Illinois Pattern Jury Instructions, Civil, at xi (1965).) That shocking fact prompted the unanimous request in 1955 by that body to this court for assistance in solving the problem. This court responded by appointing a committee of distinguished judges, law professors and trial attorneys known as the Supreme Court Committee on Jury Instructions. The dedicated members of that committee worked at least two days per month, except summers, for five years to accomplish their objective: the drafting of conversational, understandable, unslanted and accurate jury instructions for use in civil cases. Their work product was filed with this court in late 1960 and published in 1961 as *Illinois Pattern Jury Instructions—Civil*, more commonly known as IPI Civil. It has received national acclaim. (IPI Civil at vi & 7 (1965).) Our court responded to the publication of IPI by adopting

Rule 25–1, the predecessor of Rule 239. Both Rule 25–1(a) and Rule 239(a) require the use of IPI instructions unless the trial judge determines they do not accurately state the law. If no IPI instruction exists on a subject upon which the judge believes the jury should be instructed, "the instruction given on that subject should be simple, brief, impartial, and free from argument." (58 Ill. 2d R. 239(a).) *Herbolsheimer v. Herbolsheimer* (1977), 46 Ill. App. 3d 563, and *Seibert v. Grana* (1968), 102 Ill. App. 2d 283, are typical of the reviewing court decisions implementing the emphasis placed upon the use of IPI instructions.

The trial judge considered adequate, and gave, the following IPI instruction:

> "If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damage proved by the evidence to have resulted from the negligence of the defendant:
>
> 1. The nature, extent and duration of the injury.
> 2. The aggravation of any pre-existing ailment or condition.
> 3. The disability resulting from the injury.
> 4. The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries.
> 5. The reasonable expense of necessary medical care, treatment, and services received.
> 6. The value of earnings lost and the present cash value of the earnings reasonably certain to be lost in the future.
>
> Whether any of these elements of damages has been proved by the evidence is for you to determine." (IPI Civil Nos. 30.01, 30.02, 30.03, 30.04, 30.05, 30.06, 30.07.)

This instruction plainly tells the jury that they are "to fix the amount of money which will reasonably and fairly compensate him [plaintiff] for *** 2. The aggravation of any pre-existing ailment or condition." In view of that

mandate, the majority's conclusion that the IPI instruction was inadequate because element (3) of damages "makes no reference to the injuries resulting from the aggravation of a preexisting ailment or condition and can be construed to limit damages to the disability resulting from those injuries included in element (1)" (page 5, lines 2-5) seems to me quite amazing.

The instruction offered by plaintiff, the refusal of which the majority now holds constituted reversible error, was as follows:

> "If you find that the defendant was negligent and that its negligence was a proximate cause of injury to and disability of the plaintiff, you should then find for the plaintiff and his right to recover damages for such injuries and disability is not barred or to be limited in any way by the fact, if you find it to be a fact, that the plaintiff's injury and disability resulted from an aggravation of a pre-existing condition by the occurrence in question nor by reason of the fact, if you find it to be a fact, that the plaintiff because of a pre-existing physical condition was more susceptible to injury than other persons might have been."

That instruction is a composite of the three instructions held to have been improperly refused in *Pozzie v. Mike Smith, Inc.* (1975), 33 Ill. App. 3d 343. *Pozzie* is the sole authority cited by the majority for its holding here, and that case held only that one of the three refused instructions should have been given. Too, it is far from clear that the *Pozzie* court would have remanded on that ground alone. The opinion in that case holds a new trial is required because of an improper reference by defense counsel to an earlier workmen's compensation recovery for a different injury, and the instructions were discussed in order to guide the trial judge on the retrial.

As I read the majority opinion here, it concedes the argumentative nature of plaintiff's refused instruction, and the propriety of the court's refusal to give it. It then,

however, awards plaintiff a new trial because, apparently, the trial judge did not afford plaintiff an opportunity to "modify" the concededly improper instruction, despite the absence of any indication that plaintiff ever requested such opportunity.

Those of us who served as trial judges in pre-IPI days recall what a difficult task it was to sort out, from the mass of repetitive, slanted, verbose instructions frequently tendered by opposing counsel, those which might be thought to instruct the jury with some semblance of accuracy and fairness, or, *sua sponte*, to prepare others which would do so. That task was greatly simplified with the advent of IPI. The instruction tendered by plaintiff in this case, however, is reminiscent of the pre-IPI days when a prevalent vice consisted of the practice of some attorneys who would mold to their current desires, and incorporate in the form of jury instructions, statements taken out of context from opinions of this court or the appellate court. Those instructions would then be tendered to the trial judge who, with little or no time for research or reflection, decided whether to give or refuse them. As earlier noted, that procedure produced a substantial amount of error, which it was the intent of IPI and our Rule 239 to eliminate—an intent which, it seems to me, the majority opinion now frustrates.

Reference to the policies pursued by the committee during its labors is apposite here, for the trial judge, in refusing plaintiff's composite instruction, indicated its content was more appropriately emphasized by plaintiff's counsel in his argument to the jury. In the foreword to IPI Civil, second edition, the committee describes the criteria underlying those policies:

> "First, the Committee has been opposed to negative instructions, that is, instructions which tell the jury to not do something.

> Second, the Committee has not recommended instructions which single out a particular item of evidence for comment, even where there is judicial authority for the instruction.
>
> Third, the Committee has been reluctant to recommend instructions that would be appropriate only in an exceptional case and are likely to be sources of error.
>
> Fourth, and perhaps most important, the Committee has opposed over particularizing. It has preferred to rely upon one instruction which is general in nature and has avoided creating a number of instructions on a subject which is adequately covered by the single general instruction.
>
> Underlying all these considerations has been a major policy. We have viewed the problem of communicating law to the jury as one best handled by a partnership between court and trial counsel rather than by the court alone. The Court will in understandable language fairly state the law, permitting counsel on each side to supply adversary emphasis, rather than try to neutralize partisan instructions, sounding first like plaintiff's counsel and then in the next sentence like defense counsel. In brief, on many occasions when the Committee has rejected an instruction, it has felt not so much that the point ought not be told to the jury, but rather that it should be told to the jury by counsel rather than by the Court." *Foreword* to IPI Civil at vi-vii (2d ed. 1971).

The court's opinion does not even indicate the verdict to be inadequate, which, if it were, might be cause for concern as to the adequacy of the instructions. I agree that the verdict is not inadequate, although I would also agree that a somewhat higher verdict would not have been excessive in view of the conflicting testimony. But the matter of resolving contradictory testimony as to damages is a function for which we traditionally say juries are peculiarly well suited. (*Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494; *Lindroth v. Walgreen Co.* (1950), 407 Ill. 121; *Barbour v. Chicago Transit Authority* (1976), 41 Ill. App. 3d 888, 894; *Reed v. Knol* (1972), 7 Ill. App. 3d 163, 166.) The jury here had before it a

plaintiff with a congenitally weak back who had been involved in a number of industrial and nonindustrial accidents during preceding years, none of which were revealed by him to Dr. Scuderi or Dr. Sahgal; he complained of pain for which his own medical experts could find no objective support, nor did they find any objective cause for his limping as he did; and in Dr. Sahgal's opinion plaintiff was "employable" and had "an excellent vocational potential." The jurors had been instructed to "reasonably and fairly compensate" plaintiff for the "aggravation of any pre-existing ailment or condition," and whether and to what extent that aggravation had occurred was for them to decide.

In my opinion the trial judge properly held the given IPI instruction was adequate. In any event, the additional instruction tendered by plaintiff was neither simple, impartial nor free from argument as Rule 239 requires, and it was properly refused. It is, in my judgment, neither necessary nor fair to reverse this trial judge for failing to modify and then give a refused instruction he was never requested to change. The court's action in doing so seems to me a nullification of the significant benefits from IPI, and a substantial step backward to the undesirable practices of pre-IPI days.

I would reverse the judgment of the appellate court and affirm the judgment of the trial court.

MR. JUSTICE RYAN, also dissenting:

I join in Mr. Justice Underwood's dissent. However, having shared his frustrating experiences as a trial judge in pre-IPI days, I am compelled to separately voice my opposition to the majority's rending of the very principle of pattern jury instructions.

The pattern instructions given in this case informed the jury in very simple, straight-forward, nonargumentative language that the plaintiff was entitled to recover as an element of damages the "aggravation of any pre-existing ailment or condition." If, as the majority holds, the plaintiff is entitled to add to the instruction given another instruction which expands on this element of damages by stating that recovery "is not barred or to be limited in any way by the fact *** that the plaintiff's injury and disability resulted from an aggravation of a pre-existing condition" then arguably a plaintiff would likewise be entitled to similarly expand on and more precisely tailor to his benefit instructions as to every element of damages. If this is permissible for the plaintiff, then I assume the defendant would likewise be entitled to an instruction that recovery is barred or limited if the jury finds that the injury did not result from an aggravation of a preexisting condition and to other instructions as to other elements of damages which would be more restrictive than the IPI instruction and which would naturally be tailored to benefit the defendant. The majority opinion, I fear, is regressive and retreats toward pre-IPI days.

The majority conjectures that the plaintiff had no opportunity to offer a modification of the defective instruction. There is no indication that the plaintiff requested a modfication of the tendered instruction. The burden of preparing and tendering jury instructions is primarily on the parties and not on the trial court. (*People v. Grant* (1978), 71 Ill. 2d 551, 557; 58 Ill. 2d R. 239; Ill. Rev. Stat. 1977, ch. 110, par. 67.) With certain exceptions,

the trial court is under no obligation to give jury instructions not requested by counsel. (*People v. Damen* (1963), 28 Ill. 2d 464, 469; *People v. Springs* (1972), 51 Ill. 2d 418, 425.) In *Sweeney v. Max A. R. Matthews & Co.* (1970), 46 Ill. 2d 64, 69, this court stated: "The defendant was certainly entitled to have the jury properly instructed on this issue [citation], but just as clearly the trial court's refusal to give incorrect instructions was not error." In *Sweeney* in the appellate court (94 Ill. App. 2d 6) the opinion noted that the plaintiff's objection was not to the form of the instruction but to the giving of any instruction on the subject. The court stated that it was the defendant's obligation to tender a proper instruction on the applicable law and since he did not he could not complain that his instruction was refused. (94 Ill. App. 2d 6, 30.) In *Kinka v. Harley-Davidson Motor Co.* (1976), 36 Ill. App. 3d 752, the court stated that if the plaintiff failed to meet her obligation to tender a proper instruction on the applicable law she could not complain that her instruction was refused. To the same effect see *Herbolsheimer v. Herbolsheimer* (1977), 46 Ill. App. 3d 563.

Even if the plaintiff were entitled to an instruction on aggravation of a preexisting condition, in addition to the IPI instruction given, the instruction tendered clearly could not be given in the form tendered. If it would have been given and a verdict would have been returned in favor of the plaintiff, the defective instruction would have constituted serious grounds for reversal and the granting of a new trial to the defendant. I therefore do not think that we should order a reversal in this case based upon the trial court's refusal to give a clearly erroneous plaintiff's instruction.

APPENDIX B

Opinion of the Appellate Court of Illinois

MR. JUSTICE LORENZ delivered the opinion of the court:

This appeal arises from an action to recover damages for the personal injuries sustained by plaintiff as he worked on a loading dock operated by defendant. Following a jury trial, judgment was entered for plaintiff in the amount of $50,000. The trial court denied plaintiff's motion for a new trial on the issue of damages only and it is from the denial of that motion that plaintiff appeals. He contends that a new trial on the issue of damages is warranted because: (1) the trial court erred when it allowed defense counsel to elicit testimony regarding plaintiff's prior injuries, (2) the trial court erred when it refused plaintiff's tendered jury instruction number 12, (3) defense counsel's reference to a criminal charge against plaintiff and his final argument to the jury were both highly improper and prejudicial, and (4) the jury failed to adequately consider each and every element of damages in arriving at its verdict.

At trial the following evidence pertinent to this appeal was adduced.

For plaintiff

Plaintiff Vito Balestri on his own behalf

On May 16, 1973, his trucking experience consisted of approximately 19 years as a truck driver, and eight years as a dispatcher. Prior to 1971 he had been relatively free of injury. Between 1971 and 1973, he sustained injuries to his back, left elbow, right hip and left shoulder, and there-

fore missed work for several months each year. He returned to work in late April of 1973, and handled a full and normal workload. On May 16, he drove a tractor with a forty foot trailer to Terminal Freight Handling Company. Upon his arrival, Bernard Boos, an employee of defendant, was assigned to help him load 20 cartoned refrigerators, each one standing approximately 6½ feet high and weighing between 400 and 500 pounds, onto the truck. To load a refrigerator, he would hold a two wheeled dolly while Boos would push the carton to the edge of the four wheeled cart, or "flat," upon which it was standing. As Boos tipped the refrigerator toward him, he would push the blade of the dolly underneath it, catching it on the dolly, and receiving the weight of the falling refrigerator with the upper part of his body. He and Boos would then run the refrigerator up a ramp to the trailer, and he would bring it into the trailer and position it.

After loading 18 refrigerators in the manner described above, Boos tipped the 19th one toward him. As it began to tilt, a two by four board of wood started to slide off the top of the carton. He yelled "look out". Boos ran away, and he jerked to his right. The refrigerator fell and he caught its full impact with his body, while the board struck him on his left elbow. Boos then took the load while he leaned against a door post. He was taken to the doctor who was on the premises. An x-ray of his arm revealed no broken bones, but he refused to allow the doctor to examine his back saying that he had to report the accident to his employer. After contacting his dispatcher, and switching tractors with another driver, he drove back to All-American Transport.

He began to visit Dr. Coleman on a weekly basis from May to October, and received various treatments for his back and elbow. He returned to his work as a truck driver in September, but had to stop on the fourth day because his pain was too great. In October he visited Dr. Scuderi, an orthopedic surgeon, and was hospitalized at St. Joseph's Hospital where a number of surgical and therapeutic procedures were performed. He next was hospitalized at the Rehabilitation Institute of Chicago and was under the care of Dr. Sahgal. Since the time of his accident his back has given him constant pain and he is no longer capable of a variety of activities which he used to engage in before his accident. He identified a number of bills which he incurred for medical services and prescriptions which totaled $4,-118.50.

On cross-examination he admitted that since 1964 he had been treated for a number of various injuries including an injury to his left elbow in 1972, and a back injury in 1971. He admitted that in September 1973 after he found that he could no longer drive a truck and was told by his boss that no other job was open, he did not apply anywhere else for any other job.

Bernard Boos under section 60, an employee of defendant

On the day of the accident he was working with plaintiff in the manner which plaintiff described. As he was standing next to plaintiff tilting one of the refrigerators onto the dolly, he noticed a piece of wood that was starting to fall from the top of the carton. While holding the refrigerator, he ducked his head out of the way. After the wood fell, he and plaintiff finished putting the refrigerator on the

floor. Plaintiff did not appear to him to be in any pain. Plaintiff said that the wood hit and hurt his arm.

Emmett Jefferson under section 60, an employee of defendant

On May 16, 1973, he was Ben Boos' supervisor. He did not see the accident. His description of the procedure for loading refrigerators from flats onto trucks corroborated plaintiff's testimony. At trial he would only say that plaintiff "looked funny," but he admitted testifying at a deposition that after the accident plaintiff appeared to be in pain. He denied that plaintiff said anything to him about twisting his body, but he admitted testifying at a deposition that plaintiff told him he twisted to avoid being hit by the wood. He acknowledged that he saw plaintiff rubbing his shoulder and arm. He denied ever having seen the type of wood which struck plaintiff being used on the loading dock, but admitted testifying at a deposition that he had seen defendant's employees use that type of wood as a block in their loading operations.

On direct examination he stated that plaintiff never complained about having injured his lower back or elbow, and that plaintiff's walk appeared to be normal. He recalled that he had seen two by four pieces of wood brought into the terminal on trucks, and that truck drivers would throw the wood and other rubbish anywhere they could. He acknowledged that it was his duty to inspect the cartons which contained the refrigerators, but he did not know that a piece of wood was on top of a refrigerator on the day of the incident.

Dr. Carl Scuderi

He is an orthopedic surgeon. He first examined plaintiff on October 10, 1973 and determined that his lower back was weaker than normal due to a congenital condition known as spondylolisthesis. This normally would not cause any problems, but an injury adding stress would be competent to produce pain and disability. Plaintiff also had an inflammation of the joint lining in his left elbow, but he made a good recovery after an operation and had no further complaints. Although he prescribed various treatments for plaintiff's back, plaintiff continued to complain of severe pain. He concluded that plaintiff had a functional overlay, which did not mean that plaintiff wasn't having the pain, but rather he could not find any objective medical justification for it. In his opinion, the history he was given of plaintiff's May 16th accident was medically competent to cause the complaints for which he treated plaintiff.

On cross-examination he aeknowledged that although objective findings generally appear after someone has had pain for a considerable amount of time, plaintiff's objective findings were negative. He admitted that the tests he conducted did not objectively indicate that a man should limp to the degree that plaintiff did.

Owen McCaffrey

He is an actuary employed by the Wyatt Company. His figures showed that the average work life expectancy of a hypothetical 53 year old male in the work force is approximately 12 years. His hypothetical calculations showed that from May 16, 1973 to February 16, 1976, plaintiff lost

$39,185 in wages. Plaintiff's future wages discounted to present value were calculated to be $154,294.

On cross-examination he admitted that his figures are hypothetical averages and that he did not know what wages plaintiff actually earned.

Dr. Vinod Sahgal

He is a neurologist and rehabilitation expert at the Rehabilitation Institute of Chicago where he examined and treated plaintiff. He found that plaintiff had a congenital condition of spondylolisthesis, as well as several signs of disability in his legs and back. He concluded that plaintiff's complaints could be competently caused by his objective medical condition. In his opinion, plaintiff's condition was permanent, and would prevent him from lifting heavy weights or working as a truck driver.

On cross-examination he admitted that although he asked plaintiff did not tell him about any other back injuries. He acknowledged that based upon his examination, he determined that plaintiff was employable in the right type of work and had excellent vocational potential. He admitted that the objective medical findings did not appear to be sufficient to justify the amount of pain which plaintiff complained of, but that this was not unusual, since the psychological and emotional aspects of functional overlay played a part.

Dorothy Holbrook

She is a secretary at the Rehabilitation Institute of Chicago. She produced all of plaintiff's medical records, and stated that the bill for services rendered to him totaled $4,597.40.

Linda McBride

She works in the records department at St. Joseph's Hospital. She produced all of plaintiff's medical records, and stated that the bill for his hospitalization and services rendered to him totaled $8,717.58.

Dr. Kenneth Peiser

He is a clinical psychologist at the Rehabilitation Institute of Chicago. Plaintiff showed a testing pattern typical for people who are depressed due to a physical disability, and he seemed to feel inadequate with a damaged sense of self-esteem. Although he did not think that plaintiff was complaining of a disability to gain attention, he thought that plaintiff probably could return to work. He interviewed plaintiff again in January, 1975 and did not reach any different conclusions.

On cross-examination he acknowledged that most people suffer degrees of depression from time to time and that he did not do any vocational counseling with plaintiff.

Patrick J. Hickey

He is the Chicago Terminal Manager for All-American Transport, Inc., where plaintiff was employed as a truck driver. In 1973, due to an injury, plaintiff had missed work from February to the end of April. After the May 16th accident plaintiff next worked during the week which ended on September 21, 1973.

On cross-examination he admitted that in every year in which plaintiff had worked for All-American Transport, starting with August 1, 1970 there was a period of time

when he missed work due to injuries. He acknowledged that in 1971 plaintiff suffered a lower back injury.

For defendant

Dr. Louis Pertt

He is an industrial physician and surgeon who sees patients from several companies, including defendant. Reading from his records, he stated that he examined plaintiff on May 16, 1973 and found that there was no swelling or discolorations in his left elbow, that its motion was good, and that the x-rays of it were negative. He treated and bandaged plaintiff and did not see him again.

On cross-examination he admitted that he is not board certified. He did not see any calcium deposits in plaintiff's left elbow.

Ralph Kravis, defendant's office manager

The refrigerators that plaintiff was handling on May 16, 1973 had been unloaded the night before when all of the docks were operating and numerous persons had access to the premises.

On cross-examination he acknowledged that prior to unloading defendant's employees are supposed to examine the cartons for any evidence of damage.

OPINION

Plaintiff first contends that the trial court erred when it allowed defense counsel to cross-examine him regarding his prior injuries. Plaintiff argues that those injuries were unrelated and irrelevant to the injuries in issue, and since

defendant failed to connect them, their admission into evidence was reversible error. It is clear that when counsel has failed to supply the connection needed to make evidence admissible, opposing counsel must move to strike the unconnected and therefore inadmissible evidence, or the point is waived. (*Greig* v. *Griffel* (1977), 49 Ill. App. 3d 829, 364 N.E.2d 660; *Craft* v. *Acord* (1974), 20 Ill. App. 3d 231, 313 N.E.2d 515.) Since plaintiff never moved to strike the testimony complained of, he has waived any error in its admission. We note, additionally, that plaintiff himself on direct examination brought up the subject of his prior injuries, and that any evidence thereof, even if elicited on cross examination, would be properly before the jury. *Palsir* v. *McCorkle* (1966), 70 Ill. App. 2d 425, 216 N.E.2d 682.

Plaintiff next contends that the trial court's refusal of his tendered instruction number 12 was error. That instruction advised as follows:

> If you find that the defendant was negligent and that its negligence was a proximate cause of injury to and disability of the plaintiff, you should then find for the plaintiff and his right to recover damages for such injuries and disability is not barred or to be limited in any way by the fact, if you find it to be a fact, that the plaintiff's injury and disability resulted from an aggravation of a pre-existing condition by the occurrence in question nor by reason of the fact, if you find it to be a fact, that the plaintiff because of a pre-existing physical condition was more susceptible to injury than other persons might have been.

A tortfeasor is liable for the injuries he causes even though the injuries were aggravated by a pre-existing con-

dition. (*Chicago City Ry. Co.* v. *Saxby* (1904), 213 Ill. 274, 72 N.E. 755.) Defendant argues, however, that since the jury was given Illinois Pattern Jury Instruction, Civil, No. 30.03 (2d ed. 1971), which provides that the plaintiff must be compensated for, *inter alia,* "the aggravation of any pre-existing ailment or condition," it was therefore adequately and sufficiently instructed. We disagree. At trial and throughout this appeal plaintiff has relied on *Pozzie* v. *Smith* (1975), 33 Ill. App. 3d 343, 337 N.E.2d 450, in which the court held that I.P.I. Instruction No. 30.03 did not adequately advise the jury and that the trial court's refusal of plaintiff's tendered instruction left the jury without proper judicial guidance. (33 Ill. App. 3d at 347, 337 N.E. 2d at 453.) In the instant case, as in *Pozzie,* one of defendant's main defenses to plaintiff's action was that his physical condition was substantially pre-existing. Plaintiff's tendered instruction, therefore, sought to respond to the emphasis which had been placed on his prior injuries. The trial court, however, simply rejected the tendered instruction without any attempt at modification or alteration. In reaching its decision, the *Pozzie* court correctly stated that, "IPI instructions are not intended to be all inclusive." (33 Ill. App. 3d at 347, 337 N.E.2d at 453.) We therefore conclude that the simple refusal of plaintiff's tendered instruction was indeed an error which left the jury to consider the issue of damages without proper judicial guidance.

A new trial solely on the issue of damages may be granted only where the damage issue is so separable and distinct from the issue of liability that a trial of it alone may be had without injustice, and where the damages awarded do not appear to be the result of a compromise

on the question of liability. (*Paul Harris Furniture Co.* v. *Morse* (1957), 10 Ill. 2d 28, 139 N.E.2d 275.) A review of the record indicates that this standard has been met in the instant case. It does not appear that the damages awarded by the jury were the result of a compromise on the question of liability. The verdict entered against defendant on that question is amply supported by the evidence, and although we have found that the refusal of plaintiff's tendered instruction left the jury without proper judicial guidance as to the issue of damages, the issue of liability was not thereby affected. We, therefore, conclude that this cause should be remanded to the trial court with direction to grant a new trial solely on the issue of damages.

Since this cause must be remanded for a new trial as described, we need not reach the issues plaintiff has raised regarding whether the jury adequately considered each and every element of damages, and whether defense counsel's closing argument was improperly prejudicial. We would note, regarding the latter issue, that at no time during the trial did plaintiff object to the allegedly prejudicial argument. Since the argument does not appear to be so inflammatory and prejudicial so as to deteriorate the judicial process (*cf. Belfield* v. *Coup* (1956), 8 Ill. 2d 293, 134 N.E.2d 249), plaintiff's failure to object at trial must be considered a waiver of the issue. (*Bruske* v. *Arnold* (1970), 44 Ill. 2d 132, 254 N.E.2d 453, *cert. denied,* 398 U.S. 905, 90 S. Ct. 1697, 26 L. Ed. 2d 65; *Miceikis* v. *Field* (1976), 37 Ill. App. 3d 763, 347 N.E.2d 320.) An issue which does command itself to our current attention is plaintiff's allegation of prejudice due to defense counsel's reference

to an unrelated criminal charge. During cross-examination of Dr. Kenneth Peiser, who had interviewed plaintiff, defense counsel asked "[w]ould you say that a man who had been accused of contributing to the delinquency—," but was interrupted by opposing counsel's objection. This objection was sustained, the question was ordered stricken, and the trial judge specifically instructed the jury to completely disregard it. It is nevertheless clear that the question conveyed irrelevant information to the jury, and posed a substantial probability of prejudice. Although the trial court's careful admonishment to the jury to disregard the question leaves us reluctant to conclude that prejudice actually resulted, we must condemn defense counsel's inquiry as being wholly unwarranted and improper. (See, *Morse* v. *Michaelson, Rabig & Ramp* (1968), 101 Ill. App. 2d 366, 243 N.E.2d 271.) We trust that on remand it will not be repeated.

Based on the foregoing the judgment of the circuit court is reversed and the cause is remanded for a new trial on the issue of damages only.

Reversed and remanded.

MEJDA and WILSON, JJ., concur.

APPENDIX C

Order Denying Rehearing

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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September 28, 1979

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No. 50581—Vito Balestri, appellee, vs. Highway & City Transportation, Inc., appellant. Appeal, Appellate Court, First District.

The Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court
